State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

March 14, 2011

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-08-0523; TCEQ Docket No. 2007-0768-AIR-E; In Re: Executive Director Of The Texas Commission On Environmental Quality v. Advantage Asphalt Products, Ltd., RN104955497

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than April 4, 2011 Any replies to exceptions or briefs must be filed in the same manner no later than April 14, 2011.

This matter has been designated **TCEQ Docket No. 2007-0768-AIR-E; SOAH Docket No. 582-08-0523**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at http://www10.tceq.state.tx.us/epic/efilings/ or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Stephen J. Pacey
Administrative Law Judge

SJP/Ls
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY: **Environmental Quality, Texas Commission on (TCEQ)**

STYLE/CASE: **ADVANTAGE ASPHALT PRODUCTS LTD**

SOAH DOCKET NUMBER: **582-08-0523**

REFERRING AGENCY CASE: **2007-0768-AIR-E**

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE** **ALJ STEPHEN J. PACEY**
REPRESENTATIVE / ADDRESS	**PARTIES**
BLAS J. COY, JR. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY OFFICE OF PUBLIC INTEREST COUNSEL P.O. BOX 13087, MC-103 AUSTIN, TX 78711-3087 (512) 239-6363 (PH) (512) 239-6377 (FAX)	OFFICE OF PUBLIC INTEREST COUNSEL
JENNIFER N COOK ATTORNEY TEXAS COMMISSION ON ENVIRONMENTAL QUALITY MC-175 P.O. BOX 13087 AUSTIN, TX 78711-3087 (512) 239-1873 (PH) (512) 239-3434 (FAX)	TCEQ EXECUTIVE DIRECTOR
SCOTT KNUTSON MANAGER ADVANTAGE ASPHALT PRODUCTS, LTD P. O. BOX 51772 AMARILLO, TX 79159-1772 (806) 371-7283 (PH) (806) 372-0400 (FAX)	ADVANTAGE ASPHALT PRODUCTS, LTD

SOAH DOCKET NO. 582-08-0523
TCEQ DOCKET NO. 2007-0768-AIR-E

IN THE MATTER OF AN ENFORCEMENT ACTION AGAINST ADVANTAGE ASPHALT PRODUCTS, LTD.; RN104955497	§ § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess $46,221.00 in administrative penalties against Advantage Asphalt Products, LTD., (Respondent or Advantage Asphalt) for violations of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE (TAC) §§ 116.110(e), 116.115(b)(2)(E)(i), and 116.615(8). The ED alleges that Respondent failed to notify the Commission when moving a rock crusher from site to site, and that Respondent failed to demonstrate his compliance with the permit, which was caused by his failure to keep proper records.

The Administrative Law Judge (ALJ) recommends that the Commission find that the violations occurred, assess an administrative penalty of $46,221.00, and order the corrective actions recommended by the ED

II. PROCEDURAL HISTORY AND JURISDICTION

An initial Proposal for Decision (PFD) was submitted to the Commission on January 22, 2008, to which a January 29, 2008 Motion to Set Aside the Judgment and Reopen the Record was filed. On February 11, 2008, the ALJ denied the motion and allowed the parties to file exceptions. At a Commission Open Meeting held August 6, 2008, the ALJ recommended a proposed penalty based on the default PFD. The Commissioners decided that Respondent should be given another opportunity for a hearing, and on August 11, 2008, the Commission issued an order remanding the matter to the State Office of Administrative Hearings (SOAH).

After the remand, the case was handled as a new case with the following procedural history:

October 21, 2008	Order setting Preliminary hearing.
November 3, 2008	Agreed motion to waive appearance at Preliminary hearing and proposed scheduling order.
December 2, 2008	Scheduling Order.
March 31, 2009	The parties received a series of continuances from March 31, 2009, to December 11, 2009. The continuances were granted in response to status reports indicating the parties were trying to resolve the case.
December 21, 2009	Order establishing procedural schedule and notice of hearing.
January 6, 2010	Executive Director's First Amended Preliminary Report and Petition.
March 11, 2010	Order granting Respondent's attorney's request to withdraw.
April 12, 2010	The Executive Director's Motion for Summary Disposition.
July 15, 2010	After briefing, a telephone hearing was conducted to consider the Motion for Summary Disposition.
July 21, 2010	Order granting in part and denying in part the Executive Director's Motion for Summary Disposition. The ALJ determined that there was no genuine issue of material fact concerning the violations, but there were questions of material fact concerning the penalties attributed to the violations.
November 5, 2010	Hearing on the Merits on the penalty issue.
January 10, 2010	After allowing the parties time to brief the issues, the record was closed January 10, 2011, when the ALJ received the ED's proposed Findings to Fact and Conclusions of Law.

III. LEGAL AUTHORITY FOR SUMMARY DISPOSITION

The Commission's rule at 30 TEX. ADMIN. CODE § 80.137(c) provides:

> Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses,

exhibits and authenticated or certified public records, if any, on file in the case at the time of hearing, or filed thereafter and before disposition with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.

IV. DISCUSSION

A. Background Facts.

On December 19, 2005, Advantage Asphalt Products, Ltd. obtained for the Irlbeck Site an Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, Tier II (Standard Permit #1) to operate a rock crusher there.[1] The terms of this Standard Permit state that it will expire after a crusher is located at the site for 180 non-consecutive days or operates 1,080 hours, whichever comes first. On May 19, 2006, Advantage Asphalt obtained a virtually identical permit (Standard Permit #2) for the BFI Site.[2]

In addition to the time limits contained in these permits, each Standard Permit imposed some requirements on Advantage Asphalt if it moved a rock crusher from one of the sites. The permits require that Advantage Asphalt notify TCEQ if a rock crusher is moved off a site and then later returned to the site, and obtain approval to return a rock crusher to a site.[3] The permits also require that this notification contain the permit holder's previous duration at the site in order to show compliance with the 180 non-consecutive days and 1,080 hours limitation.[4] Advantage Asphalt

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[1] TCEQ Ex. 5 at 1.

[2] TCEQ Ex. 6.

[3] TCEQ Ex. 5 at 5: Standard Permit § (3)(F)–(G); Pl's Ex. 6 at 5: Standard Permit § (3)(F)–(G).

[4] TCEQ Ex. 5 at 5: Standard Permit § (3)(E)–(F); Pl's Ex. 6 at 5: Standard Permit § (3)(E)–(F).

stated that it used the same rock crusher at both the Irlbeck Site and the BFI Site.[5] Advantage Asphalt has stated that it did not notify TCEQ prior to returning the rock crusher to the BFI and Irlbeck Sites on four occasions when the rock crusher was moved off the sites.[6]

In addition to providing notice when it moved and returned rock crushers to these sites, Advantage Asphalt was also required to maintain various records under these permits. Specifically, Advantage Asphalt for a rolling period of 24 months had to maintain records regarding: (1) operating hours for both the Irlbeck Site and the BFI Site, including daily start and stop times; (2) the throughput per hour of the feed hopper; and (3) the date(s) the crusher was placed on the site and the date(s) it was removed from the site.

B. Violations.

The ED alleged that during an investigation conducted on March 1-2, 2007, and a follow-up record review, a TCEQ investigator determined that Advantage Asphalt violated the following requirements:

1. TEX. HEALTH & SAFETY CODE § 382.085(b); TEX. ADMIN. CODE § 116.115(c); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, Tier II(3)(G) by failing to notify the TCEQ prior to locating at a site. Specifically, Advantage Asphalt failed to notify the TCEQ when it moved its Rock Crusher No. 3 to the Irlbeck Site on three separate occasions, and on one occasion to the BFI Site.

2. TEX. HEALTH & SAFETY CODE § 382.085(b); TEX. ADMIN. CODE §§ 116.115(b)(2)(E)(i) and 116.615(8); Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) by failing to keep the records of operating hours as specifically required by the permit and necessary for determining compliance with the permit. Specifically, Advantage Asphalt did not have records of it operating hours at the Irlbeck Site, and consequently, TCEQ staff could not determine whether operations had exceeded the limit set by the permit.

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[5](TCEQ Ex. 3: Interrogatory Nos. 2, 4.

[6] TCEQ Ex. 3: Request for Admission Nos. 2–14; TCEQ Ex. 4: Interrogatory No. 10; TCEQ Ex. 12.

3. TEX. HEALTH & SAFETY CODE § 382.085(b); TEX. ADMIN. CODE §§ 116.115(b)(2)(E)(i) and 116.615(8); Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) by failing to keep the records of operating hours as specifically required by the permit and necessary for determining compliance with the permit. Specifically, Advantage Asphalt did not have records of it operating hours at the BFI Site, and consequently, TCEQ staff could not determine whether operations had exceeded the limit set by the permit.

4. TEX. HEALTH & SAFETY CODE § 382.085(b); TEX. ADMIN. CODE §§ 116.115(b)(2)(E)(i) and 116.615(8); Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) and New Source Review Portable Permit No. 81693L001, Special Condition 11 by failing to keep the records of operating hours as specifically required by the permit and necessary for determining compliance with the permit, including specifying crusher activity and the location of the crushers at the Sites, the complete date for each day at the Sites, operation start and stop times, and hours of operation for the permit. Specifically for records of both the Irlbeck and BFI Sites, Advantage Asphalt did not have records specifying location, movement and operation of crushers at each Site, specific dates in records of its operations, and consequently, TCEQ staff could not determine compliance from the records.

Respondent did not dispute that at certain times it violated each of these provisions by its failure to keep proper records from November 2005 until August 2007. There was no genuine issue of material fact concerning the violations; therefore, a Partial Summary Disposition was granted.

V. PARTIES' POSITIONS

The ED has established as a matter of law that Respondent committed the aforementioned violations. At the hearing, Respondent stipulated and agreed to the allegations contained in Violation No. 1 and 4. Advantage Asphalt also agreed with the base penalties of $4,000 for Violation No. 1 and $1,000 for Violation No. 4. Consequently, Findings based on the Stipulations are set forth in the Findings of Fact and Conclusions of Law in the Proposed Order, without further recitation here.

The primary issue at the hearing was how many events or violations should be attributed to Respondent's failure to record operating hours. The ED asserted that the failure to keep records of

operating hours at the Irlbeck Site, as specifically required by the permit and necessary for determining compliance with the 1,080 operating hours limitation in the permit, is a programmatic major violation. According to the Penalty Policy, it equates to an adjusted base penalty for each violation event of 10 percent of the maximum penalty. The ED asserted that because the Respondent was unable to demonstrate compliance with the 1,080 operating hours limitation throughout the term of the permit, it is a continuing violation and, according to the Penalty Policy, continuing programmatic major violations case can be assessed up to daily. At the hearing, the ED recommended that this violation be assessed monthly, for 21 monthly events based on the terms of the permit from November 25, 2005, to August 3, 2007, for a total violation base penalty of $21,000. The basis of the violations at the BFI site was the same as Irlbeck site; therefore, the ED also recommended for the BFI site that this violation to be assessed monthly, for 14 monthly events based on the term of the permit from June 9, 2006 to August 3, 2007, for a total violation base penalty of $14,000.

Respondent disagreed and insisted that this was a record keeping violation; consequently, Respondent said that the Commission was charging double. Advantage Asphalt explained that the ED attributed violations (events) to both the Irlbeck site and the BFI site when the crusher was at the Irlbeck site and to both when the crusher was at the BFI site. Respondent pointed out that there was only one crusher, and it only operates at one site, not two. In Respondent's opinion, the crusher operates at one site at a time, and the failure to properly record is only a violation for that site, but not the site where no operations are conducted. Respondent asserted that record keeping is required only if operations are being conducted at that site. According to Respondent, if the violations are limited to those occasions when crusher was actually operating on the site, then the events for the Irlbech site would be reduced from 21 to 14 and for the BFI site would be reduced from 14 to 9.

Additionally, Respondent claimed that he was entitled to a good faith reduction because of its efforts to become compliant. The ED argued that to qualify for a good faith reduction the Respondent should have been compliant as to all of the violations when the original Petition was filed. According to the ED, Advantage Asphalt was not.

VI. ANALYSIS

Respondent's theory is incorrect. Respondent argued that the failure to keep records was only a violation when Advantage Asphalt was operating at a specific site. And the violation should not apply to other sites where there were no operations. Respondent ignores the fact that the events are not calculated on the basis a failure of record keeping, but a failure to demonstrate compliance with the permit. This is a continuing rather than discrete violation. If the record keeping is insufficient to show that the crushers operating hours are less than 1,080 for a Tier II permit, then it becomes impossible to demonstrate compliance with the permit that limits operation to 1,080 hours. The rule[7] states under the category "record keeping" that the records must contain enough information to demonstrate applicability and compliance with the permit. Because the records were absent until 2007 Respondent cannot demonstrate that he is in compliances with the permit. TCEQ did not require Respondent to record hours of operations on days when there are no operations. Instead Respondent had a continuing violation amounting to 21 events or months for the Irlbeck site and 14 event or months for the BFI site. Even the records Respondent produced indicating hours of operation from January 2007 to August 2007[8] do not alleviate the situation because without a starting point, as to the past hours of operation, the Commission cannot determine whether Respondent is in compliance with the permit. In addition, because Respondent has not demonstrated a return to compliance as to all violations, it is not entitled to a good faith reduction.

V. RECOMMENDATION

In sum, the ALJ recommends the Commission approve the partial summary disposition granted to the ED and against the Respondent; find penalty for each violation is appropriate; and find that the Respondents has violated the regulations as alleged; and adopt the attached proposed Order,

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[7] 30 TEX. ADMIN. CODE § 116.615(8).

[8] These records have limited credibility because they were not produced until May 2010 (2007 records), and Respondent could not identify who prepared them; when they were prepared; or where they were prepared.

which assesses an administrative penalty of $46,221 against Respondent and requires Respondent to take the appropriate corrective actions.

SIGNED March 14, 2011.

STEPHEN J. PACEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Assessing Administrative Penalties Against and Ordering Corrective Action by Advantage Asphalt Products Ltd., RN104955497; TCEQ Docket Nos. 2007-0768-AIR-E; SOAH Docket No. 582-08-0523

On _____, 2011, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition (FARP), which recommended that the Commission enter an order assessing administrative penalties against and requiring corrective action by Advantage Asphalt Products (Respondents or Advantage Asphalt). A Proposal for Decision (PFD) was presented by Stephen J. Pacey, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Advantage Asphalt Ltd., (Respondent or Advantage Asphalt) owns and operates two rock crusher sites (Sites) located at:
   a. Approximately two miles west of the intersection of Brown Road and Cemetery Road, west of the city of Canyon, Randall County, Texas (Irlbeck Site); and
   b. 20700 Helium Road, Canyon, Randall County, Texas (BFI Site).

2. Each of the Sites consists of one or more sources as defined in TEX. HEALTH & SAFETY CODE § 382.003(12).

3. On March 1-2, 2007, Advantage Asphalt was in violation of:

a. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE § 116.115(c); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, Tier II (3)(G) by failing to notify the TCEQ prior to locating at a site. Specifically, Advantage Asphalt failed to notify the TCEQ when it moved its Rock Crusher No. 3 (Serial Number B00751049R) to the Irlbeck Site on three separate occasions; March 2, 2006, August 11, 2006, and February 27, 2007; and on one occasion to the BFI Site on September 16, 2006.

b. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§ 116.115(b)(2)(E)(i) and 116.615(8); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) by failing to keep records of operating hours as specifically required by the permit and necessary for determining compliance with the permit. Specifically, Advantage Asphalt did not have records of its operating hours at the Irlbeck Site, and consequently, TCEQ staff could not determine whether operations had exceeded the limit set by the permit.

c. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§ 116.115(b)(2)(E)(i) and 116.615(8); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) by failing to keep records of operating hours as specifically required by the permit and necessary for determining compliance with the permit. Specifically, Advantage Asphalt did not have records of its operating hours at the BFI Site, and consequently, TCEQ staff could not determine whether operations had exceeded the limit set by the permit.

d. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§ 116.115(B)(2)(E)(I) AND 116.615(8); Air Quality Standard Permit for Temporary Rock and Concrete Crushers, General Requirement (M); and New Source Review Portable Permit No. 81693L001, Special Condition 11 by failing to keep records containing information and data sufficient to demonstrate compliance with the permit, including specifying crusher activity and location of the crushers at the Sites, the complete date for each day at the Sites, operation start and stop times, and hours of operation for Permit No. 81693L001. Specifically, for records of both the Irlbeck and BFI Sites, Advantage Asphalt did not have records specifying location, movement and operation of crushers at each Site, specific dates in records of its operations, and consequently, TCEQ staff could not determine compliance from the records.

4. On July 7, 2007, the ED filed the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. § 7.054.

5. Respondent did not appear at the preliminary hearing convened on December 6, 2007.

6. A default PFD and Order were submitted to the ED on January 26, 2008.

7. In order to provide Respondent a hearing, the Commission, in an August 6, 2008 open meeting, remanded the case back to SOAH at the request of the Respondent.

8. The October 21, 2008 notice of hearing:

   a. Indicated the time, date, place, and nature of the hearing;

   b. Stated the legal authority and jurisdiction for the hearing;

   c. Indicated the statutes and rules the ED alleged Respondent violated.

   d. Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and the previously filed ED's Preliminary Report and Petition being deemed as true and the relief sought in the notice possibly being granted by default; and

   e. Included a copy of the ED's penalty calculation worksheet, which shows how the penalty was calculated for the alleged

9. On January 6, 2010, the ED filed a First Amended Executive Director's Preliminary Report and Petition (Amended EDPRP), which contained allegations concerning the above-noted March 1-2, 2007 violations.

10. In the Amended EDPRP, the ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of $46,221.00, against the Respondent for the alleged violations. The ED also recommended that the Commission order the Respondent to take certain corrective action.

11. On April 12, 2010, the ED filed a motion for summary disposition.

12. After considering the ED's motion for summary disposition, the Respondent's response, and the evidence, on July 21, 2010, the ALJ issued an order granting in part the ED's

motion for summary disposition. The ALJ granted summary disposition as to the violations and corrective action and denied summary disposition as to the amount of the penalty.

13. On August 9, 2010, the ALJ issued an order setting the hearing on the merits as to the amount of the penalty for November 5, 2010.

14. On November 5, 2010, the ALJ convened the hearing on the merits. The ED and the Respondent appeared through their representatives. The Office of Public Interest Counsel did not appear or seek a continuance.

15. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

16. The failure to notify the TCEQ four times prior to relocating a crusher at a site is a programmatic major violation, which according to the Penalty Policy, equates to an adjusted base penalty for each violation event of 10 percent of the of the maximum $10,000 penalty, or $4,000. At the hearing, the Respondent stipulated to this violation base penalty of $4,000.

17. The failure to keep records of operating hours at the Irlbeck Site, as specifically required by the permit and necessary for determining compliance with the 1,080 operating hours limitation in the permit, is a programmatic major violation. According to the Penalty Policy, it equates to an adjusted base penalty for each violation event of 10 percent of the maximum penalty. Because the Respondent was unable to demonstrate compliance with the 1,080 operating hours limitation throughout the term of the permit, it is a continuing violation, and according to the Penalty Policy, continuing programmatic major violations case can be assessed up to daily. At the hearing, the ED recommended that this violation be assessed monthly, for 21 monthly events based on the term of the permit from November 25, 2005, to August 3, 2007, for a total violation base penalty of $21,000.

18. The failure to keep records of operating hours at the BFI Site, as specifically required by the permit and necessary for determining compliance with the 1,080 operating hours

limitation in the permit, is a programmatic major violation. According to the Penalty Policy, it equates to an adjusted base penalty for each violation event of 10 percent of the maximum penalty. Because the Respondent was unable to demonstrate compliance with the 1,080 operating hours limitation throughout the term of the permit, it is a continuing violation, and according to the Penalty Policy, continuing programmatic major violations case can be assessed up to daily. At the hearing, the ED recommended that this violation to be assessed monthly, for 14 monthly events based on the term of the permit from June 9, 2006 to August 3, 2007, for a total violation base penalty of $14,000

19. The failure to keep other records in addition to the records described in Finding of Fact Nos. 17 and 18 above, – including records specifying location, movement and operation of crushers at each Site and specific dates in records of its operations – is a programmatic moderate violation. According to the Penalty Policy, it equates to an adjusted base penalty for each violation event of 5 percent of the maximum $10,000 penalty, or $500. One single event was assessed for the Irlbeck Site and one single event was assessed for the BFI Site. At the hearing, the Respondent stipulated to these violation base penalties of $1,000.

20. Because of the avoided costs associated with the violations in Finding of Fact Nos. 16, 17, and 18 above, there should be a $6,221 upward adjustment to the penalty as other factors as justice may require.

21. The total administrative penalty for all of the above violations, calculated in accordance with the Penalty Policy, is $46,221.

22. Assessing an administrative penalty of $46,221 against the Respondent is reasonable and justified given the violations committed by the Respondent and considering the factors set forth in TEX. WATER CODE § 7.053.

23. The corrective action requested by the ED is necessary, justified, and appropriate given the violations established.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction, or of any rule, order, or permit adopted or issued thereunder.

2. Under TEX. WATER CODE § 7.052, a penalty may not exceed $10,000 per violation, per day for the violations alleged in this proceeding.

3. In addition to imposing an administrative penalty, the Commission may order the violator to take corrective action, as provided by TEX. WATER CODE § 7.073.

4. As required by TEX. WATER CODE § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the violations as contained in the EDPRP and the Amended EDPRP and of the opportunity to request a hearing on the alleged violations and the proposed penalties and corrective actions.

5. As required by TEX. GOV'T CODE §§ 2001.051(1) and 2001.052; TEX. WATER CODE § 7.058; 1 TEX. ADMIN. CODE § 155.401; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective actions.

6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ch. 2003.

7. Based on the Findings of Fact and Conclusions of Law, Respondent violated:

   a. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §116.115(c); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, Tier II (3)(G) by failing to notify the TCEQ prior to relocating to the Irlbeck Site and BFI Site.

b. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§116.115(b)(2)(E)(i) and 116.615(8); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) by failing to keep records of operating hours for the Irlbeck Site as specifically required by the permit and necessary for determining compliance with the 1,080 operating hour limitation in the permit.

c. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§116.115(b)(2)(E)(i) and 116.615(8); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) by failing to keep records of operating hours for the BFI Site as specifically required by the permit and necessary for determining compliance with the 1080 operating hour limitation in the permit.

d. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§116.115(b)(2)(E)(i) and 116.615(8); Air Quality Standard Permit for Temporary Rock and Concrete Crushers, General Requirement (M); and New Source Review Portable Permit No. 81693L001, Special Condition 11 by failing to keep records containing information and data sufficient to demonstrate compliance with the permit, including specifying crusher activity and location of the crushers at the Sites, the complete date for each day at the Sites, operation start and stop times, and hours of operation for Permit No. 81693L001.

8. In determining the amount of an administrative penalty, TEX. WATER CODE § 7.053 requires the Commission to consider several factors including:

a. Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;

b. The nature, circumstances, extent, duration, and gravity of the prohibited act;

c. The history and extent of previous violations by the violator;

d. The violator's degree of culpability, good faith, and economic benefit gained through the violation;

e. The amount necessary to deter future violations; and

f. Any other matters that justice may require.

9. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, the ED correctly calculated the penalties for each of the alleged violations and a total administrative penalty of $46,221 is justified and should be assessed against Respondents.

10. Based on the above Findings of Fact, Respondents should be required to take the corrective action that the ED recommends.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Respondent Advantage Asphalt is assessed an administrative penalty in the amount of $46,221 for violations of the above noted Commission rules. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order in this section. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Advantage Asphalt Products, Ltd.; TCEQ Docket No. 2007-0768-AIR-E" to::

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 10 days after the effective date of the Commission Order, Advantage Asphalt shall:

   a. Implement improvements to notification requirement procedures that will prevent the failure to request relocation or change of location authorization and the failure to obtain written approval prior to moving a rock crusher to a new site; and

   b. Implement improvements to record keeping procedures that will prevent the failure to create and maintain all of the records required by New Source Review Portable Permit No. 81693L001, Special Condition 11.

3. Within 25 days after the effective date of this order, Respondent shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

   "I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations."

   Advantage Asphalt shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

   Order Compliance Team
   Enforcement Division, MC 149A
   Texas Commission on Environmental Quality
   P.O. Box 13087
   Austin, TX 78711-3087

   with a copy to:

   Manager, Air Section
   Amarillo Regional Office
   Texas Commission on Environmental Quality
   3918 Canyon Drive
   Amarillo, Texas 79109-4933

4. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director

determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.

5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

6. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE § 2001.144.

7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.

8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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BRYAN W. SHAW, Chairman
For the Commission